

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

DWAYNE ANTHONY,

Defendant-Appellant.

UNPUBLISHED

August 19, 2014

No. 314902

Wayne Circuit Court

LC No. 12-005842-FH

Before: RIORDAN, P.J., and DONOFRIO and, BOONSTRA JJ.

PER CURIAM.

Defendant appeals as of right his convictions of felon in possession of a firearm (“felon in possession”), MCL 750.224f, carrying a concealed weapon (“CCW”), MCL 750.227, and possession of firearm during the commission of a felony (“felony-firearm”), MCL 750.227b, following a jury trial. Defendant was sentenced, as a third habitual offender, MCL 769.11, to 18 months to 10 years in prison for both the felon in possession and CCW convictions and two years in prison for the felony-firearm conviction. Because defendant was not denied the effective assistance of counsel and because defendant failed to establish any evidentiary errors, we affirm.

This case arises from a police raid on a drug house. Detroit Police Officer Aref Algarrafi was working with his partner, Officer Nicholas Hurd, and other officers from the Detroit Police Department and the Department of Homeland Security. When Algarrafi arrived at the drug house, he smelled a strong odor of marijuana and saw people sitting around a dining room table, packaging marijuana. Algarrafi and the other officers entered the dwelling and ordered the occupants to get on the ground. Defendant got on the ground but kept one hand under his stomach and “kept moving around.” Algarrafi handcuffed defendant, rolled him over, and saw a bulge “weighing down” defendant’s shirt. Officer Brian Gadwell recovered a loaded, Glock 27 handgun from under defendant’s shirt. A “large amount” of marijuana, packaged in a freezer bag containing 155 smaller ziplock bags, was also confiscated from the house.

After the jury found defendant guilty of the charged crimes, defendant filed a motion for a new trial and for a *Ginther*¹ hearing in the trial court, which was denied.

I. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant first argues that he is entitled to a new trial because he was denied the effective assistance of counsel. We disagree.

The underlying issue of whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v Trakhtenberg*, 493 Mich 38, 47; 826 NW2d 136 (2012). The court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859, amended 481 Mich 1201 (2008).

Criminal defendants have a right to the effective assistance of counsel under the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20; *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Vaughn*, 491 Mich 642, 669; 821 NW2d 288 (2012). To establish that a defendant's trial counsel was ineffective, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *Trakhtenberg*, 493 Mich at 51. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Vaughn*, 491 Mich at 670. Moreover, there is a strong presumption that counsel's assistance constitutes sound trial strategy. *People v Armstrong*, 490 Mich 281, 291; 806 NW2d 676 (2011). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009).

Defendant claims that his trial counsel was ineffective because he did not file a motion in limine or otherwise object when the prosecution sought to impeach defendant with a prior conviction for larceny from a motor vehicle, when defendant elected to testify in his own defense. But because the trial court ultimately determined that the evidence of the conviction was admissible, defendant cannot establish any prejudice from defense counsel's failure to object to its admission.

On cross-examination, the prosecutor sought to impeach defendant by asking, "Have you ever been convicted of a crime involving theft or dishonesty in the past ten years?" Defendant replied, "Yes." The trial court later instructed the jurors to consider defendant's prior conviction solely for the purpose of assessing whether they believed defendant's testimony.

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Prior convictions may be used to impeach a witness's credibility if the requirements of MRE 609 are satisfied. *People v Snyder (After Remand)*, 301 Mich App 99, 105-106; 835 NW2d 608 (2013). MRE 609 provides, in part:

(a) For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross examination, and

(1) The crime contained an element of dishonesty or false statement, or

(2) the crime contained an element of theft, and

(A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and

(B) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs its prejudicial effect.

* * *

(c) Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date.

But because there was no objection at the time, the court was not called upon to make a formal ruling of its admissibility under MRE 609 at trial. However, at the subsequent hearing on defendant's motion for a new trial, the trial judge ratified the admissibility of the prosecutor's impeachment question, observing that, "it wasn't even brought out what that crime was. It would be permissible under MRE 609." Consequently, even assuming *arguendo* that counsel was deficient in failing to lodge an objection, defendant cannot establish any prejudice because the trial court stated that it would have ruled the evidence admissible, in spite of any objections.²

² It is significant that, for this issue, defendant does not challenge the trial court's ultimate ruling but, instead, only asserts an ineffective assistance of counsel claim. Thus, our only consideration is whether trial counsel's performance fell below an objective level of reasonableness and if so, but for that error, whether the outcome of the trial would have been different. Given that the trial court stated that it found the evidence admissible, it is patently clear that defendant's failure to raise an objection had no effect on whether the evidence would have been admitted, let alone the trial's outcome. Furthermore, if defendant did raise that evidentiary issue on appeal, because it was unpreserved, it would have been reviewed for plain error affecting substantial rights. *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003). Under these circumstances, defendant would not be able to establish the presence of any plain error.

Therefore, defendant has failed to establish the requisite prejudice in order to prevail on his claim of ineffective assistance of counsel.

II. EVIDENTIARY ISSUES

Defendant next argues that the trial court's decision to disallow testimony regarding who possessed the marijuana and its street value was erroneous because defendant wanted to argue that the gun belonged to someone else in the house. Defendant also contends the trial court abused its discretion when it denied defense counsel an opportunity to rehabilitate defendant's credibility by showing that defendant took responsibility when he was guilty by his plea to a prior offense.

We review preserved evidentiary issues for an abuse of discretion. *People v Jackson*, 292 Mich App 583, 594; 808 NW2d 541 (2011). A trial court abuses its discretion when it "chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Mahone*, 294 Mich App 208, 212; 816 NW2d 436 (2011). "When the decision involves a preliminary question of law however, such as whether a rule of evidence precludes admission, we review the question de novo." *People v Mardlin*, 487 Mich 609, 614; 790 NW2d 607 (2010).

Generally, all relevant evidence is admissible, and irrelevant evidence is not. MRE 402; *People v Starr*, 457 Mich 490, 497; 577 NW2d 673 (1998); *People v Benton*, 294 Mich App 191, 199; 817 NW2d 599 (2011). Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *People v Watkins*, 491 Mich 450, 470; 818 NW2d 296 (2012); *Benton*, 294 Mich App at 199-200. Under this definition, evidence is admissible if it is helpful in shedding light on any material point, *People v Murphy (On Remand)*, 282 Mich App 571, 580; 766 NW2d 303 (2009).

When defense counsel asked Sergeant Larry Meinke who the marijuana was seized from, the prosecution objected on the basis of relevance. The court sustained the prosecutor's objection on that basis. Defense counsel then asked Meinke, "do you have any idea what the value of that marijuana seized was?" The court again sustained the objection, finding that "[i]t's not relevant. Objection sustained as to what the value of it was."

Defendant also contests the trial court's ruling sustaining the prosecutor's objection to defense counsel's asking defendant, with reference to his prior conviction, if defendant was "found guilty or pled guilty." The prosecution objected on the basis that this inquiry was irrelevant, the court sustained the objection, and defendant withdrew the question.

The court was correct in observing that the weapons crimes defendant was charged with were unrelated to the issue of who owned, or the value of, the marijuana seized from the drug house. It is difficult to see how evidence of the ownership of the marijuana, or its economic value, would have any tendency to make defendant's possession of the gun more probable or less probable than it would be without the evidence. *Watkins*, 491 Mich at 470. Evidence of ownership of the marijuana or its value would not be helpful in shedding light on any material point relating to whether defendant was in possession of the gun identified by the police. *Murphy*, 282 Mich App at 580. Therefore, the proposed evidence was, as the trial court

determined, irrelevant. As a result, the court did not abuse its discretion in precluding the evidence.

With regard to defense counsel's attempt to follow up on evidence of the prior conviction by asking whether that conviction stemmed from a plea or a trial, the court properly excluded this inquiry. Because the impeachment evidence was offered for the limited purpose of challenging the credibility of defendant, it was not otherwise relevant to the facts of the case. Nothing in the MRE 609 states that a conviction is to be treated any differently if it is the result of a trial or a plea, and defendant cites to no supporting authority as well. Moreover, defendant merely argues on appeal that the evidence of the prior plea was admissible to "show[] that he admits when he is wrong." This, however, is an attempt to rehabilitate a witness's credibility, after being impeached, through the use of specific instances of conduct, which is governed by MRE 608(b). Notably, defendant does not address this rule and how it supports the admission of the evidence. Because a party may not merely announce a position and leave it to this Court to explain his arguments and then search for supporting authority, the argument is abandoned. *Payne*, 285 Mich App at 195.

Affirmed.

/s/ Michael J. Riordan

/s/ Pat M. Donofrio

/s/ Mark T. Boonstra